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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

C.R. JOHNSON (Mrs.), et al.,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in view of this Court's opinion in *Trans World Airlines, Inc. v. Thurston*, the court of appeals erred in finding that an air carrier may deny crewmembers the opportunity to serve as flight engineers after age sixty on the basis of their inability to serve as captains.

2. Whether an employer can meet its burden of proving that age is a "bona fide occupational qualification" with evidence based on factors other than age and the ability to perform the particular job in question.

3. Whether the jury was properly instructed on the bona fide occupational qualification defense.

PARTIES

The plaintiffs-appellants below were:

Leroy F. Berkebile, Charles H. Cate, William F. Ciocys, Byron S. Cramblet, Thomas P. Fenton, George E. Green, Hubert L. Henderson, John P. Jastrab, C.R. Johnson (Mrs. Joyce), Fred G. Johnson (Mrs. Lucille), Louis F. Mahoney, William E. Maki, John W. Malandro, Frederick J. McGinn, Edwin F. McNeil, O.D. Peterson, Fay Reay, Daniel M. Regan, DeWitt T. Ross, Jr., Ralph A. Seifert, Bernard J. Thompson, and Edgar L. Vassar.

American Airlines, Inc. was defendant-appellee.

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OCTOBER TERM, 1984

C.R. JOHNSON (Mrs.), et al.,

Petitioners,

v.

AMERICAN AIRLINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners C.R. Johnson (Mrs.), *et al.*, respectfully pray that a writ of certiorari issue to review the decision of the court below.[1]

---

[1] The following abbreviations are used in this brief: "A____" refers to the Appendix to this brief; "Tr." designates pages in the trial transcript; "R.E." refers to excerpts of the record filed in the court below; "PX" and "DX" refer to plaintiffs' and defendant's trial exhibits, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 745 F.2d 988 and appears in the Appendix hereto at page A1. The judgment of the district court is reproduced at page A13. The district court's decision denying respondent's motion for summary judgment is reported at 31 Empl.Prac.Dec. [CCH] ¶33,417 and is reproduced in the Appendix hereto at page A15.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1984. No petition for rehearing was filed. This petition is filed within 90 days of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the district court was based on 29 U.S.C. §§216 and 626(c).

STATUTES AND REGULATIONS INVOLVED

Sections 4(a)(1) and (2) of the Age Discrimination in Employment Act, 29 U.S.C. §623(a)(1) and (2), provide:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

Sections 4(f)(1) and 4(f)(2) of the ADEA, 29 U.S.C. §623(f)(1) and (2), provide:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

Part 121.383(c) of the Federal Air Regulations, 14 C.F.R. §121.383(c), provides:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

Petitioners in these actions under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*, are former flight deck crewmembers for respondent American Airlines, Inc. who were forced to retire upon reaching their sixtieth birthdays. Seventeen of the twenty-two petitioners were captains, four were flight engineers, and one served as a captain until a few months before his sixtieth birthday, when he downbid and commenced flight engineer training.[2] They alleged that respondent violated ADEA Section 4(a), 29 U.S.C. §623(a), in refusing to allow the captain petitioners to transfer to the flight engineer position and in requiring all petitioners, including those serving as flight engineers, to retire at sixty.[3] Respondent denied the violations and asserted that its actions were excused under two exceptions to the ADEA:

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[2] Respondent employs two groups of crewmembers in the position designated by the Federal Aviation Administration as "flight engineer." It uses the term "career flight engineer" to refer to individuals employed before 1964 who, under a labor agreement, are permitted to remain permanently in the flight engineer position (Tr. 113). Respondent permits these individuals to work until age seventy. As of October 1982, 145 of respondent's 450 to 480 career flight engineers were over sixty years of age (PX 708; Tr. 120). "Flight Officers" are crewmembers hired since 1964, serving as flight engineers, who have the opportunity to advance to copilot and captain positions. The duties of the two groups of flight engineers are identical (Tr. 110-116). This brief will use "flight engineer" to refer to both categories of employees, except where reference to "career flight engineers" is appropriate.

[3] The company gave all petitioners the same explanation for denying their requests for continued employment past age sixty: "You are considered a pilot by American Airlines and are subject to retirement at age 60, regardless of the qualifications you hold or the cockpit seat in which you are serving on that date." (R.E. 70, 71).

first, that age under sixty is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of its business, and second, that the differentiation is based upon reasonable factors other than age (RFOA). 29 U.S.C. §623(f)(1).

Shortly before trial, respondent moved for summary judgment, based on the RFOA defense and a new contention that its actions were taken to "observe the terms of a bona fide seniority system." 29 U.S.C. §623(f)(2). Respondent denied that its actions were based on age, asserting that "[i]t is only because plaintiffs are disqualified from serving as Captain and Copilots by the FAA that American does not permit them to serve as Flight Officers" (A18). The court denied summary judgment and also concluded that the two defenses were unavailable as a matter of law (A16). Finding that "younger pilots are permitted to downbid and older pilots approaching 60" are not, the court ruled that respondent's practice could not be justified by "reasonable factors other than age" (A18). Furthermore, since the plaintiffs sought to preserve their seniority rights and were not attacking the seniority system, the "bona fide seniority system" defense was not applicable (A21-A22).[4]

At trial, respondent's evidence related to the same theories presented in its summary judgment motion: first, that its "up or out" policy required flight engineers (except "career flight engineers") to be "capable of progressing" to pilot positions so as not to block the flight engineer seat (the seat-blocking defense),[5] and second, that

[4] Respondent's motions for reconsideration and for certification to file an interlocutory appeal were denied (R.E. 54, 57). It did not appeal or cross-appeal from the summary judgment ruling.

[5] Respondent's "up or out" policy required crewmembers to qualify for the next higher position when they became most senior

(Footnote continued on following page)

permitting the captain petitioners to serve as flight engineers, subordinate to younger, less experienced captains, could interfere with the crew concept and endanger safety (the back-seat driver defense). This evidence was presented to support two incompatible positions: a *denial* that respondent's actions were age-based, and an *admission* that the actions were age-based, coupled with a contention that they were justified as a BFOQ.

The jury returned a verdict for respondent. Answering two special interrogatories, it found, first, that age was a determining factor in respondent's policy not to allow each plaintiff to occupy or to continue to occupy the flight officer position, and second, that, with respect to each plaintiff, the policy was based on a BFOQ (R.E. 35-36).

Following the denial of their motion for new trial (R.E. 40), plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed (A2). The court held that a BFOQ may be based upon an "up or out" policy, as well as on factors other than age and ability to perform the particular job (A4-A8). It also found that the jury had been correctly instructed on the BFOQ affirmative defense (A8-A10), and that respondent had presented evidence to support the jury's finding on BFOQ (A10-A11).

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[5] *continued*
at their base (DX 2, §23-H). Once a crewmember qualified as a captain, however, he satisfied the "up or out" policy, and did not need to do so again the remainder of his career (Tr. 164-67, 309-10, 316, 321, 324). Respondent's management testified that a captain could bid to flight engineer and remain in that position until he was required to retire at age sixty (Tr. 129-31, 443-44, 687; *see* R.E. 71). Plaintiffs had all satisfied the "up or out" policy, except for the four flight engineer plaintiffs who did not have sufficient seniority to be requested to advance to copilot at their base (Tr. 167).

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's opinion is squarely in conflict with this Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985). The court below approved a BFOQ which was based not on petitioners' inability to perform the flight engineer job, but rather on their inability to serve as captains after age sixty due to the FAA's "age 60 rule," 14 C.F.R. §121.383(c). This finding is precisely contrary to this Court's decision in *TWA*, which held that a BFOQ must be based on the " 'particular' position of flight engineer," and cannot be based on an age limitation for a different position:

> Nothing in the legislative history cited by petitioners indicates a congressional intention to allow an employer to discriminate against an older worker seeking to transfer to another position, on the ground that age was a BFOQ for his *former* job.

53 U.S.L.W. at 4027.[6]

Like TWA, respondent permits downbidding and "bumping" by younger pilots in a variety of situations.[7] Since

[6] The Court will consider the question of BFOQ for the particular position in the public employment context in *Johnson v. Mayor and City Council of Baltimore* and *EEOC v. Mayor and City Council of Baltimore, cert. granted*, 53 U.S.L.W. 3506 (U.S. Jan. 14, 1985) (Nos. 84-518 and 84-710).

[7] From May 1980 through October 1982, 803 crewmembers under sixty transferred from captain to copilot or from copilot to flight engineer (R.E. 82, 93). Two, including petitioner Fred G. Johnson, transferred from captain to flight engineer (Tr. 176, 694-95). In addition, following a merger in the 1970's, ten captains on another airline began serving as flight engineers for respondent (PX 724; R.E. 81). Other reasons for downbidding include increased salary, personal preference regarding vacation or work schedules and working conditions, as well as downbids due to reductions in force (Tr. 145-46, 332-33, 681-82).

downbidding and "bumping" ("transfers") by younger pilots are freely permitted, and since the "up or out" policy is satisfied for life once a pilot reaches captain (Tr. 324), the only proficient crewmembers who stand to lose their employment under the policy are those reaching age sixty.[8] This policy thus is discriminatory on its face (A18); *see TWA*, 53 U.S.L.W. at 4026. The forced retirement of petitioners violates the ban on mandatory retirement in the 1978 ADEA amendments, 29 U.S.C. §623(f)(2), and cannot be justified as a BFOQ. *TWA*, 53 U.S.L.W. at 4027.

Certiorari should be granted to conform respondent's practice to the *TWA* decision and to assure a uniform standard in the airline industry on the age sixty flight engineer issue. The rights of crewmembers on different carriers should not rest on semantic variations of the same argument. Whether presented as a BFOQ for captains or as a BFOQ for those not "capable of progressing" to captain, a policy precluding flight engineer service after age sixty is not sustainable under the ADEA.

2. The ADEA contains a narrow exception permitting age-based discrimination where "*age* is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. §623(f)(1) (emphasis added). The Fifth Circuit's determination that a BFOQ may be proved by evidence *not* based on age or ability to perform the "particular" job is at odds with *TWA* and the decisions of other circuits and presents an important question of statutory interpretation warranting review by this Court.

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[8] The policy is also riddled with exceptions. The 450-480 remaining "career flight engineers," including those who merged into respondent's operations in the 1970's, are not required to progress to pilot ranks (Tr. 113).

Respondent's BFOQ defense focused on its "seat blocking" argument, an adjunct to the "up or out" policy. Respondent claimed that it used the flight engineer position as a training seat for future pilots and that if too many ex-captains became flight engineers the training seats would be blocked and safety might be endangered.[9] This is the antithesis of a BFOQ in every respect: (1) it has nothing to do with the *age* of the individual, contrary to the plain language of the Act; (2) it has no relationship "to the actual ability of the employee to perform his or her assigned job," *ALPA v. TWA*, 713 F.2d 940, 951 (2d Cir. 1983), *aff'd in part, rev'd in part sub nom. TWA v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985); and (3) it concededly does not apply to the petitioners themselves, but rather to hypothetical pilots who might follow in future years.[10]

Similarly, the "back seat driver" argument was not based either on age or age-related performance, but rather

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[9] The "seat blocking" argument rested on the hypothesis that all 1,000 pilots turning age sixty within the next ten years would request transfers to flight engineer and work to age seventy (Tr. 419-20, 466-68). In contrast, only 10% of the pilots reaching age sixty between 1978 and 1984 sought flight engineer employment by joining this action (Tr. 465-66). Further, respondent's novice flight engineers served on the B-727, which has 1,000 to 1,200 flight engineer positions. The 22 petitioners would serve at the DC-10 flight engineer position, which is not a "training seat" (Tr. 227-28). Respondent also employed flight engineers on B-747 and B-707 aircraft, and operated DC-9 and B-767 aircraft with two pilots and no flight engineer (Tr. 23).

[10] Even assuming that there might someday be enough age sixty downbidders to block training seats, it still does not satisfy the statutory requirement that the defense can be proven only where age *is* a BFOQ, rather than where, in the distant future, it *will be* a BFOQ.

on prior service as a captain.[11] Respondent's management asserted that the defense would apply to all persons who had served as captains "even if it was just for one day" (Tr. 478).[12] Because there was no age basis for the job qualification under this argument, by definition it cannot constitute a BFOQ. *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).[13]

The decision below fails to recognize that an age limitation sought to be justified as a BFOQ must be based on the excluded persons' age-related inability to perform the job. The court's holding, which invites employers to introduce evidence unrelated to age in support of a BFOQ,

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[11] Respondent did not assert this defense against the four petitioners who were in the flight engineer position at age sixty. Thus, the "back seat driver" argument is not sufficient by itself to sustain the verdict against all petitioners.

[12] In contrast, petitioners' evidence showed that "senior captains, FAA officials, and American management and training personnel had in the past ridden in the cockpit without endangering safety" (A11, n.4), and that 803 crewmembers under sixty had downbid, including many who had previously served as captains (R.E. 82, 93). Petitioners also presented testimony from several of the more than 100 former captains who have served as flight engineers after age sixty on other major commercial airlines (Tr. 247-90, 357-61; R.E. 72, 78).

[13] The decision below is squarely in conflict with *Smallwood*, which involved a maximum hiring age for pilots. In a striking parallel to this case, the airline based its BFOQ defense in part on possible disruption to the "crew concept" associated with moving from command to a subordinate position. While agreeing that the crew concept was safety-related, the court held it to be "of no help to United in claiming a BFOQ exception for its hiring practices":

> [T]here is no reliable evidence that United's "crew concept" would be impaired by the sole factor of hiring Flight Officers, starting as Second Officers, over the age of 35. This alleged harm to the "crew concept" is a function of prior experience, not age at hire.

661 F.2d at 307-08.

would permit the "extremely narrow" BFOQ exception to swallow the rule against discrimination on account of age. *See Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).[14]

3. Finally, the Court should grant certiorari to review the BFOQ instruction. The charge given here did not tie the need for the limitation to the age of the individuals affected and explicitly allowed consideration of "more than simply the individual plaintiff's ability to perform the tasks of the flight officer job" by instructing that:

> You may also consider the effect that allowing plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program, *or any other reason relating to safety.*

(A24) (emphasis added).

This instruction is inconsistent with the BFOQ test in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which has been adopted by all circuits to consider the issue.[15] *Tamiami* follows the statutory require-

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[14] Other courts, recognizing the narrowness of the BFOQ exception, have held that explicit age-based policies cannot be justified by factors "other than age." *Smallwood, supra*, 661 F.2d at 307-09; *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *EEOC v. County of Allegheny*, 519 F.Supp. 1328 (W.D. Pa. 1981), *aff'd*, 705 F.2d 679 (3d Cir. 1983); *EEOC v. Marathon County*, 27 Empl.Prac.Dec. [CCH] ¶32,274 (W.D. Wis. 1981); *Marshall v. Goodyear Tire and Rubber Co.*, 19 Empl.Prac.Dec. [CCH] ¶8973 (W.D. Tenn. 1979). This is consistent with the Court's interpretation of the BFOQ exception under Title VII. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977).

[15] *See, e.g., Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 753 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982); *EEOC v. City of St. Paul*, 671 F.2d 1162, 1166 and n.7 (8th Cir. 1982); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir.

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ment that the qualification, based on *age*, be reasonably necessary to the particular business. It focuses on the ability to assess the job performance of persons over the age limit on an individualized basis. 531 F.2d at 235-36. The instruction also was erroneous in that it required respondent to demonstrate only a "reasonable basis" for its policy, rather than prove that the age limitation is "reasonably *necessary*," as required by the statute. 29 U.S.C. §623(f)(1); *see Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845 (6th Cir. 1982) (employer must prove retirement policy for corporate pilots is reasonably necessary, rather than merely "reasonable"); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670, 676-77 (9th Cir. 1980) (rejecting "reasonable" standard for proving flight attendant pregnancy policy a BFOQ).

This Court has under review the appropriate standard for a BFOQ instruction in another age-sixty flight engineer case. *Western Air Lines, Inc. v. Criswell*, No. 83-1545 (oral argument held January 14, 1985). In light of the pendency of that case, certiorari should be granted to review the BFOQ instruction given here against the correct standard.

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[15] *continued*

1982); *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *see Mahoney v. Trabucco*, 738 F.2d 35, 38 (1st Cir.), *cert. denied*, 105 S.Ct. 513 (1984).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the opinion and judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Joyce M. JOHNSON, As Executrix of the Estate of C.R. Johnson, Deceased, Hubert L. Henderson, and Charles H. Cate, For and in Behalf of Themselves and All Others Similarly Situated, Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC., Defendant-Appellee.

Lucille D. JOHNSON, As Executrix of the Estate of Fred G. Johnson, Deceased, Plaintiff-Appellant,

v.

AMERICAN AIRLINES, INC., Defendant-Appellee.

No. 83-1610.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1984.

Before GARZA, REAVLEY and JOHNSON, Circuit Judges.

REAVLEY, Circuit Judge:

Twenty-two employees of American Airlines brought an action against American alleging violation of the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §§ 621-634 (1982). The ADEA provides that,

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

29 U.S.C. § 623(a) (1982). The district court dismissed plaintiffs' action upon a jury verdict in favor of American. We affirm.

The operating crew of most aircraft in American's fleet consists of a captain, copilot, and flight officer. The captain is in command of all aspects of the aircraft and its crew. The copilot is second in command and assists the captain in flying the aircraft. The flight officer monitors the aircraft's fuel, electrical, hydraulic and other systems before, during, and after the flight but does not do any piloting of the aircraft.

In 1964, as a result of the increased operational complexity of jet aircraft and an alarming number of American aircraft accidents in the early 1960's, American altered its cockpit crew training and hiring policies. The hiring policy adopted was to hire only future captains as flight officers[1] and to require crew members to train and qualify for the next highest cockpit position, to which one would move in accordance with seniority and American's needs. Under this up-or-out policy, if a crew member is ever unable to progress to the next highest cockpit position, he or she must transfer to a noncockpit position or be terminated.

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[1] Prior to the adoption of this policy American hired mechanics to fill the position now held by flight officers. Known as flight engineers, these mechanics did not progress to pilot positions. With the exception of ten flight engineers acquired through merger with another airline, American has hired no flight engineers since 1964. American still employs approximately 450-480 flight engineers.

The present ADEA action arose as a result of the effect of American's up-or-out policy in conjunction with the so-called FAA age sixty rule. Under the age sixty rule, captains and copilots for commercial aircraft carriers are required to retire from these positions at age sixty. 14 C.F.R. § 121.383(c) (1984). The age sixty rule does not apply to flight officers. However, because American's up-or-out policy requires flight officers to be capable of advancing to pilot positions and because pilots must retire at sixty, American's flight officers must also retire or transfer to noncockpit positions at age sixty.

Plaintiffs in this action are or were American flight crew members who desire to continue in the flight officer position after their sixtieth birthdays. Plaintiffs claim that American's refusal to employ them as flight officers violates the ADEA.

American denied that it discriminated on the basis of age and argued alternatively that the up-or-out policy was a bona fide occupational qualification (BFOQ). The ADEA provides that an employer may discriminate on the basis of age if the employee's age is a BFOQ. 29 U.S.C. § 623(f)(1) (1982). American presented evidence that employing ex-captains who could not advance to the pilot position would block that position from use as a training seat for future pilots (seat blocking). American also introduced evidence that some ex-captains in the flight officer position (and it would be impossible to predict which ex-captains) would endanger the safety of American flights by disrupting crew coordination and reverting to captaincy behavior in times of emergencies (back seat driving). American also introduced into evidence over plaintiffs' timely objection the amount of two plaintiffs' lump sum retirements.

The issues on appeal are: first, whether a BFOQ defense must be solely related to age; second, whether the district court erred in instructing the jury regarding the BFOQ defense; third, whether there was an absolute absence of evidence to establish a BFOQ defense; and fourth, whether the district court erred in admitting evidence of plaintiffs' retirement benefits.

1. Whether a BFOQ Defense Must Be Related Solely to Age

Plaintiffs, in attacking the jury instructions and sufficiency of the evidence, assert that the BFOQ defense must relate solely to age and the employee's ability to perform the job assigned. Applying the facts of this case, plaintiffs argue that American's seat blocking and back seat driver contentions cannot, as a matter of law, be grounds for a BFOQ defense, because they are related to factors of American's overall training procedures and the ex-captain's seniority and experience.

The BFOQ defense is regarded as a narrow exception to the general prohibition against age discrimination. *Air Line Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940, 951 (2d Cir.1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, ____ U.S. ____, 104 S.Ct. 1412, 1706, 79 L.Ed.2d 739 (1984). No opinion has fully addressed the issue whether a BFOQ defense must relate solely to the employee's age. Two decisions, however, have reached opposite results without much discussion on the issue. First, *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 308 (4th Cir.1981), *cert. denied*, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982), held that the airline could not defend its maximum hiring age of thirty-five as a BFOQ, because the alleged harm to the cockpit crew was a function of seniority and not age. On

the other hand, in *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C.Cir.1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982), the court allowed the use of the BFOQ defense to uphold the airline's maximum hiring age of forty. The court held that a BFOQ defense could be based on a combination of factors including age, along with the effects of the age sixty rule, lengthy training requirements, and experience. Id. at 100-01.

The objective of a court called upon to interpret a statute is to ascertain congressional intent and give effect to legislative will. *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). The most obvious place to find congressional intent is in the statute. The ADEA states:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) *the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons*;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) *It is therefore the purpose of this chapter* to promote employment of older persons based on their ability

> rather than age; *to prohibit arbitrary age discrimination in employment*; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621 (1982) (emphasis added). Our inquiry is aided by narrowing the prohibited conduct to *arbitrary* age discrimination.

The hearings provide some guidance as to the scope of the BFOQ defense. First, Senator Randolph was concerned that the ADEA would force airlines to hire older pilots who would retire shortly after the airlines had spent thousands of dollars over many years in training. *Age Discrimination in Employment: Hearings on S. 830 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 48-49 (1967). Secretary of Labor Wirtz responded that section 4(f)(1), which contained the BFOQ and reasonable basis other than age[2] defenses, would provide airlines with a defense. *Id.*

Second, Senator Javits, the prime sponsor of the ADEA, propounded written questions to a New York government official on the application of the BFOQ defense under New York age discrimination statute, one of the state age discrimination laws after which the ADEA was modeled. *Id.* at 242. The response stated that,

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[2] It shall not be unlawful for an employer, employment agency, or labor organization—

. . . . .

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.

29 U.S.C. § 623(f)(2) (1982).

> Consideration may be given to age as a bona fide occupational qualification in *such circumstances, among others,* as the following:
>
> (a) Where age is a bona fide factor in connection with job performance.
>
> (b) *Where age is a bona fide factor in an apprentice training or on-the-job training program of long duration.*
>
> (c) Where age is a bona fide factor in fulfilling the provisions of other statutes (e.g., laws regulating employment of minors and females).

Id. (prepared written answer of Commissioner Conway, New York State Commission for Human Rights) (emphasis added). Based on the above evidence, the subcommittee that held hearings on the ADEA was cognizant of, and apparently satisfied with, the notion that the BFOQ defense need not relate solely to age and the ability to perform the assigned job.[3]

Regulations promulgated by the Department of Labor, the administrative body responsible for interpreting and administering the ADEA, should also be given considerable respect in interpreting the scope of the BFOQ

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[3] The above evidence indicates even more strongly that the length of on-the-job training and ability of the employer to recoup its investment can constitute a BFOQ defense. This position, however, was rejected in *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007, 102 S.Ct. 2299, 73 L.Ed.2d 1302 (1982). The *Smallwood* court relied on 29 C.F.R. § 806.103(h) (1980) and *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), to support its position. Neither authority, however regards the BFOQ defense. The regulation concerns the other defense in 29 U.S.C. § 623(f)(1) (1982), reasonable factors other than age. The Supreme Court decision merely rejects cost justification as a rebuttal to a prima facie showing of sex discrimination. *City of Los Angeles*, 435 U.S. at 716 & n. 31, 98 S.Ct. at 1379 & n. 31, 55 L.Ed.2d at 670 & n. 31.

defense. *See Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n. 3, 101 S.Ct. 2239, 2241 n. 3, 68 L.Ed.2d 744 (1981). The BFOQ regulation recognizes that a BFOQ defense permits federal statutory and regulatory compulsory retirement provisions imposed to protect public safety without reference to the individual's ability to perform the job. 29 C.F.R. § 860.102(d) (1983). Again, the government body responsible for interpreting the ADEA recognizes that a BFOQ defense does not have to relate solely to the employee's age and ability to perform the job assigned.

Our inquiry must also be guided by 49 U.S.C. § 1421(b) (1982), which imposes on airlines the duty to perform their services with the highest degree of safety. Accordingly, "the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely*." *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C.Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982). Courts simply do not possess the expertise with which to supplant their judgment in the best manner airlines can obtain that highest degree of safety for that of the airlines. *Id.*

We conclude that American's reasons for its policy qualify as a BFOQ defense.

2. Whether District Court Erred in Instructing the Jury on the BFOQ Defense

Plaintiffs next urge that the BFOQ instruction was confusing and misstated the applicable standard of proof. The challenged instruction read:

> One of the requirements for a bona fide occupational qualification is that it is *reasonably necessary* to the

> essence, or normal operation, of the employer's business, which in this case is the safe transportation of passengers. American need only show that it has a *reasonable basis* for its assessment of the safety risk involved.
>
> American may show its policy is *reasonably necessary* to safety and is thus a bona fide occupational qualification in either one of two ways: American may show that there is a factual basis for believing that all or substantially all persons excluded by its policy would be unable to perform safely and efficiently as flight officers for American after having lost their ability to serve as pilots; or American may show that it is impossible or impractical to determine on an individual basis which ones can safely perform, thereby justifying a reasonable, general rule. In determining whether American has a *reasonable basis* for believing that Plaintiffs would be unable to safely perform as flight officers, you may consider more than simply the individual Plaintiff's ability to perform the tasks of the flight officer job. You may also consider the effect that allowing Plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program or any other reason relating to safety.

(emphasis added).

It is well settled in the Fifth Circuit that in order to prevail on a BFOQ defense, the employer must establish:

> [first,] the classification must be *reasonably necessary* to the essence of the employer's business; [and second,] the employer must have *reasonable cause*, that is, a factual basis, for believing either that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

EEOC v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir.1983) (emphases omitted and added).

Comparing the challenged jury instruction and the correct statement of the law, we hold that the jury instruction was correct. In the first paragraph of the jury instruction, the first sentence correctly states the first prong of the BFOQ test, and the second sentence merely summarizes the second prong. In the second paragraph of the challenged jury instruction, the district court referred to the first prong and then properly and fully discussed the second prong.

3. Whether There was an Absolute Absence of Evidence to Establish a BFOQ Defense

Because plaintiffs failed to move for a directed verdict and judgment notwithstanding the verdict, this court's review of the evidence is limited to whether there was *any* evidence to support the jury verdict. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir.1978).

In their briefs, plaintiffs assert that there was an absolute absence of evidence establishing a BFOQ defense, because American's evidence was not related to age and ability to perform the assigned job. We, however, have already held that factors other than age and ability to perform may be considered in establishing a BFOQ defense.

Furthermore, we hold that there was evidence to support the jury's verdict in favor of American. First, American presented evidence that it used the third crew position to train future pilots and that the possibility existed that so many ex-captains would become flight officers that the training position would be blocked and that safety

would possibly be endangered. Second, American presented two expert witnesses who testified that in their opinion the presence of senior ex-captains in the position of third crew member created a possible hazardous situation, and that it was impossible to determine which ex-captains would pose a safety hazard.[4]

Finally, plaintiffs argue that the above evidence was introduced by American to prove that it was not discriminating on the basis of age and cannot now be used on appeal to prove the BFOQ defense. The court finds no support in the record for plaintiffs' claim that the evidence was so limited. Furthermore, if evidence was there for the jury to consider, it now may support its verdict.

4. Whether the District Court Erred in Admitting Evidence of Plaintiffs' Retirement Benefits

Plaintiffs' final contention on appeal is that the trial court abused its discretion in permitting American to introduce evidence of lump sum retirements of two of the plaintiffs.[5] Plaintiffs claim that the evidence was irrele-

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[4] Plaintiffs presented evidence to rebut American's BFOQ evidence. First, plaintiffs introduced evidence that the 450-480 permanent flight engineers created a greater seat blocking problem in American's training program than would the 22 plaintiffs. Second, plaintiffs introduced evidence that senior captains, FAA officials, and American management and training personnel had in the past ridden in the cockpit without endangering safety. Although whether a BFOQ defense is permitted where the employer allows exceptions is currently pending before the Supreme Court, *Trans World Airlines, Inc. v. Thurston*, ____ U.S. ____, 104 S.Ct. 1412, 1706, 79 L.Ed.2d 739 (1984), the issue has not been presented to this court.

[5] Plaintiffs also discuss the testimony of Thomas Quinn who testified that American would have saved money by employing plaintiffs after age sixty and suspending their pension benefits. Because this testimony was heard out of the jury's presence by the district court, Mr. Quinn's testimony need not be considered.

vant and highly prejudicial, because it led the jury to believe that plaintiffs were well-heeled and not in need of gainful employment. American argues, on the other hand, that it sought to use the evidence to prove that it would have saved money by employing plaintiffs after age sixty and suspending their pension benefits, and, therefore, its safety motivation was sincere.

We hold that the district court did not commit reversible error in admitting the evidence. First, motive is often very important in discrimination actions. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 277, 102 S.Ct. 1781, 1784, 72 L.Ed.2d 66, 72-73 (1982) (challenge to seniority system under Title VII requires showing of intent to discriminate racially). Second, the admission of evidence is largely within the discretion of the trial court, *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir.1976), and the trial court will be reversed only if the party asserting the error proves that substantial rights were adversely affected, *Crumpton v. Confederation Life Insurance*, 672 F.2d 1248, 1253 (5th Cir.1982). Plaintiffs do not demonstrate that their rights were substantially adversely affected.

The judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C. R. JOHNSON, ET AL., *Plaintiffs*	)	
v.	)	Civil Action No. CA-3-80-0434-D
AMERICAN AIRLINES, INC., *Defendant*	)	
		(Consolidated)
FRED G. JOHNSON, *Plaintiff*	)	
v.	)	Civil Action No. CA-3-81-1020-D
AMERICAN AIRLINES, INC., *Defendant*	)	

JUDGMENT
[Dated June 27, 1983]

This action came on for trial before the Court and a jury, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant American Airlines, Inc., recover of the plaintiffs Leroy Berkebile, Charles H. Cate, William F. Ciocys, Byron S. Cramblet, Thomas P. Fenton, George E. Green, Hubert L. Henderson, John P. Jastrab, C. R.

Johnson (Mrs.), Fred G. Johnson (Mrs.), Louis F. Mahoney, William E. Maki, John W. Malandro, Frederick McGinn, Edwin F. McNeil, Orwin Donald Peterson, Fay Reay, Daniel M. Regan, De Witt T. Ross, Jr., Ralph Seifert, Bernard J. Thompson, and Edgar L. Vassar its costs of action.

Dated at Dallas, Texas, this 27 day of June, 1983.

/s/ Robert M. Hill
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

C. R. JOHNSON, ET AL, *Plaintiffs*	)	
v.	)	Civil Action No. CA-3-80-0434-D
AMERICAN AIRLINES, INC., *Defendant*	)	
		(Consolidated)
FRED G. JOHNSON, *Plaintiff*	)	
v.	)	Civil Action No. CA-3-81-1020-D
AMERICAN AIRLINES, INC., *Defendant*	)	

ORDER
[Dated February 21, 1983]

Came on for consideration before the Court Defendant American Airline, Inc.'s (American) Motion for Summary Judgment. Plaintiffs C. R. Johnson, *et al* brought this action under the Age Discrimination in Employment Act 29 U.S.C. §621 *et seq.* (ADEA), to challenge American's policy of prohibiting pilots 60 years or older from transferring to the position of flight officer. American sought summary judgment based on the following two statutory defenses: (1) American's practice is based on reasonable factors other than age (RFOTA), and (2) American's prac-

tice is in observance of the terms of a bona fide seniority system. 29 U.S.C. §623(f)(1) & (2). After considering the parties' arguments, in light of the applicable law, the Court is of the opinion that American is not entitled to summary judgment. The Court further concludes that these defenses are unavailable to American as a matter of law.

Factual Background

A majority of the plaintiffs are former pilots who have been disqualified from service with American as captain or copilot through the application of the Federal Aviation Administration Age 60 Rule. 14 C.F.R. §121.383(c). Plaintiffs question their exclusion from the position of flight officer, to which the FAA Rule 60 does not apply.

A brief review of American's cockpit personnel policies is necessary to an understanding of this case. There are three cockpit positions in American's aircraft: captain, copilot, and third crew member. The third crew member may be either a flight engineer, who is a career third crew member and is not permitted or required to qualify for a higher position, or a flight officer, who is expected to progress to the position of copilot and, eventually, captain. American no longer hires flight engineers as such. Current flight engineers hold their positions pursuant to the Tripartite Agreement entered into between American, the Flight Engineers International Association, and the Allied Pilots Association (APA) in 1964. The Tripartite Agreement will remain in effect for as long as any flight engineer remains an active employee. At this time approximately 500 flight engineers are employed by American. Flight engineers are permitted to work until reaching 70 years of age.

The Tripartite Agreement provided for two independent seniority lists, the Flight Engineer System Seniority List and the Pilot System Seniority List. Each flight engineer has priority and seniority over all pilots, including flight officers, for bidding on third crew member positions. Captains, copilots, and flight officers have been included on a combined seniority list since 1965. The Pilots Agreement, between American and pilots represented by the APA, provides that seniority shall govern all matters of promotion, retention in case of work force reduction, recalls from furlough, and assignments, subject to the terms of the Tripartite Agreement.

Seniority also determines when a pilot is expected to qualify for a higher position under American's "up or out" line of progression practice. American's internal procedures provide as follows:

> There can be no such person as a permanent First Officer or Flight Officer in American Airlines. If the Company is to progress, pilots must be ready for upgrading when their services in higher capacities are required. Whenever it is determined that a pilot is incapable of progression into the next higher job category, the individual must be transferred into some other line of work or be dismissed from the service of American Airlines.

Flight Department Administrative Guide—Technical, §2.04, p.1. The Pilot Agreement itself states simply that all pilots are required to qualify in turn for the next higher pilot category.

While a pilot is expected to satisfy the "up or out" standards, he need not bid for the highest position for which he is qualified. The practice of bidding for a vacancy in a lower position is known as "down bidding." American contends, however, that it may call upon the services

of a pilot who has down bid to assume a higher position for which he is qualified. Because pilots below the age of 60 are permitted to downbid, plaintiffs contend that American's refusal to permit pilots approaching their 60th birthday to bid into such positions is unlawfully discriminatory.

REASONABLE FACTOR OTHER THAN AGE (RFOTA)

Section 4(f)(1) of the ADEA provides that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited [by the Act] . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. §623(f)(1). American argues that its refusal to allow age-disqualified pilots to serve as flight officers is based on legitimate considerations of safety, including maintenance of the crew command concept and the need to train pilots. Additionally, American relies upon its adherence to the Tripartite Agreement and the Pilot Agreement as reasonable factors explaining the differentiation.

The Court finds that the RFOTA defense is unavailable to American in the present context. American argues that its differentiation is not based on age and that "[i]t is only because plaintiffs are disqualified from serving as Captain and Copilots by the FAA that American does not permit them to serve as Flight Officers." American would have the Court overlook the fact that younger pilots are permitted to downbid and older pilots approaching age 60 disqualification are not permitted to do so. Whether lawful or unlawful, this is an example of disparate treatment.

In *EEOC v. County of Allegheny*, 519 F.Supp. 1328 (W.D. Pa. 1981), the county sought to justify its refusal to hire policemen over 35 years of age by claiming the county code provided for such a limitation and therefore,

that the differentiation was "statute dependent" rather than age dependent. The county argued that its attempted compliance with the county code was a reasonable factor other than age. Rejecting this analysis, the Court responded,

> [E]ven if the County proved that it adopted the age limitation based upon a good faith belief concerning its obligations under state law this would not fall within the "reasonable factor" justification. Whatever its motive, the fact remains that in hiring police officers the County based its employment decisions on the age of the applicant.

Id. at 1335. Here, as in *Allegheny*, the different treatment was triggered by or coincided a difference in age.

American's "reasonable factors" are generalizations; they are not the facts and circumstances peculiar to one employee, such as is characteristic of the RFOTA defense. The RFOTA defense is an attack on the plaintiff's prima facie case through which the defendant says that the employee was not treated a certain way because of his age, but because of his excessive absences, physical fitness, general inability, or other legitimate consideration.

The Court's finding that an age-related determination has been made suggests that American might attempt to transform its claimed justifications into a bona fide occupational qualification (BFOQ) defense. The Fifth Circuit's distinctions between RFOTA and BFOQ defenses confirm that American cannot rely on the RFOTA defense for an across the board immunization of its practices. When the BFOQ is invoked as a matter of confession and avoidance the burden shifts to the employer to justify its generalized treatment of a certain class of employees. *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1978). The operation of the BFOQ defense "per-

mits the employer to deal with an entire class of persons on an age-related basis in derogation of the statute." *Id.* at 591 n.3. This is clearly what American is attempting to do.

Under the undisputed material facts presented to the Court by both parties, American is not entitled to judgment under the RFOTA defense. These same undisputed facts show that, as a matter of law, the RFOTA defense presented to the Court is unavailable to American.

BONA FIDE SENIORITY SYSTEM

Citing language in a variety of documents, including the Tripartite Agreement, the Pilot Agreement, and the American Technical Manual, American argues that it is merely observing the terms of a bona fide seniority system. Section 4(f)(2) of the ADEA provides it shall not be unlawful for an employer "to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of [the ADEA], except that . . . no such seniority system . . . shall require or permit the involuntary retirement of an individual because of the age of such individual." 29 U.S.C. §[6]23(f)(2).

As a preliminary matter, the Court notes the plaintiffs' objection to American's failure to raise a proper seniority system defense in its Answer. The Court has received American's Motion to Amend, but finds that a consideration of either American's motion or Plaintiffs' objections is unnecessary because of the Court's present ruling that American's practice is not sanctioned by the bona fide seniority system exception.

In support of its seniority system defense American cites the company's up or out policy, the pilot line of progression, the company's right to require flight officers to

serve as copilot and captain as needed to run the operation, and the requirement that all pilots have the potential of serving as captain. In addition to isolated express language from various documents, American quotes certain "ancillary rules" which it claims to observe in refusing to permit pilots who are disqualified from serving as captain or copilot to serve as flight officers.

There are a number of problems with American's defense. First, the plaintiffs are seeking to preserve their rights under the existing pilot seniority system; no attack is made on any provision of the seniority system. *See Stone v. Western Airlines, Inc.*, 544 F.Supp. 33, 37 (C.D. Cal. 1982). Secondly, American's interpretation of the seniority system defense would defeat the purposes of the ADEA. While the official legislative history of the ADEA provides no assistance, there is some helpful discussion of the seniority system in the recorded debates surrounding the passage of the ADEA. Senator Yarborough explains that both the seniority system and the employee benefit plan exceptions were included to encourage hiring of older employees and to allay concerns that older employees would have to be accorded benefits disproportionate to their actual length of service. 113 Cong. Rec. 31254-55 (November 6, 1967). The Interpretative Regulations promulgated by the Department of Labor, and later by the EEOC, also suggest that American's reliance on provisions not relating to benefits commensurate with length of service is misplaced. *See* 29 C.F.R. §860.105 (Department of Labor); 29 C.F.R. §1625.8 (EEOC).

The ADEA seniority system defense does not suffer from overuse. The absence of case law interpretation presents two equally disturbing possibilities: ignoring the defense altogether or crediting it with more than Congress contemplated. In this instance American's reference

to the aggregate of written and unwritten provisions in order to terminate the seniority rights of older pilots does not fall within the protection of the seniority system defense.

The Court is not saying that the provisions supporting American's seniority system defense are to be ignored. American is free to present the policies embodied in these provisions in support of a possible BFOQ defense. At this point, the provisions themselves do not provide an explanation for the plaintiffs' inability to downbid to flight officer positions. A majority of the plaintiffs, according to the undisputed facts, satisfied the express provisions by qualifying for higher positions when called upon to do so. As to those plaintiffs who retired before reaching the position of captain or those who are still pilots but have not progressed to the highest position, American has not suggested that they failed to qualify for a higher position when called upon to do so. Thus, American's refusal to permit downbidding to flight officer is not in observance of the provisions cited. Written and unwritten provisions which do not fall within the seniority system defense cannot be made superior to statutory rights. American must show that at the time of the alleged discrimination the employee failed to satisfy a specific provision and that such failure was a reasonable factor other than age, or that the company was relying upon a generalized rule which embodies a bona fide occupational qualification.

CONCLUSION

The undisputed facts presented to the Court show that American is not entitled to judgment as a matter of law. The Court further finds that American may not rely upon either the RFOTA or the bona fide seniority system defenses as presented in its Motion for Summary Judgment.

Finally, the Court finds, in light of its disposition of the seniority system defense, that no ruling is necessary on American's motion to amend its answer.

It is so ORDERED.

Dated this 21 day of February, 1983.

/s/ Robert M. Hill
United States District Judge

COURT'S CHARGE TO THE JURY

* * *

Bona Fide Occupational Qualification

If you find that plaintiffs have proven by a preponderance of the evidence that their inability to continue in or transfer to the flight officers position was the result of policies in which age was a determining factor, then you must consider American's affirmative defense that age is a bona fide occupational qualification. One of the requirements for a bona fide occupational qualification is that it be reasonably necessary to the essence, or normal operation, of the employer's business, which in this case is the safe transportation of passengers. American need only show that it has a reasonable basis for its assessment of the safety risk involved.

American may show its policy is reasonably necessary to safety and is thus a bona fide occupational qualification in either one of two ways: American may show that there is a factual basis for believing that all or substantially all persons excluded by its policy would be unable to perform safely and efficiently as flight officers for American after having lost their ability to serve as pilots; or American may show that it is impossible or impractical to determine on an individual basis which ones can safely perform, thereby justifying a reasonable, general rule. In determining whether American has a reasonable basis for believing that plaintiffs would be unable to safely perform as flight officers, you may consider more than simply the individual plaintiffs' ability to perform the tasks of the flight officer job. You may also consider the effect that allowing plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program, or any other reason relating to safety.

* * *

R.E. 68.